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In The

Supreme Court of the United States

October Term, 1969

No. 1113

HAROLD L. BURKE, PIONEER CASUALTY COMPANY, a Texas corporation, and PIONEER GENERAL AGENCY, INC., a Texas corporation,

Petitioners,

vs.

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co., SAMUEL H. WEESE, Receiver of North Central Fire & Casualty Co., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and MURPHY FINANCE COMPANY, a Minnesota corporation,

Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

The petitioners' Statement of the Case is, in general terms, correct, and only additional comments are required. Fidelity and Deposit Company of Maryland (hereinafter Fidelity) was served in a companion case with an action by the same plaintiffs seeking recovery on an employee fidelity bond, with the same general allegations as those made in the principal action. Fidelity, in turn, commenced third-party actions against the defendants of the main action, seeking recovery in the event it should be held liable on the bond (Minnesota Court decision, 172 N.W.2d at 298 and at 299, footnote 3).

In the District Court proceedings and in the appellate proceedings in the Minnesota Supreme Court, Fidelity presented and argued independent bases for finding jurisdiction over the nonresident individuals (the petitioner, Harold L. Burke and others) and the foreign corporate defendants (Pioneer Casualty, Pioneer General and Delta).

II. ARGUMENT: REPLY TO PETITIONERS' ARGUMENTS FOR ALLOWANCE OF THE WRIT

A. The Minnesota Supreme Court and the Minnesota District Court Had Before Them Sufficient Allegations of Fact to Sustain Personal Jurisdiction Consistent with the Constitutional Requirements of the Cases of the United States Supreme Court.

1. The Test That the Minnesota Supreme Court Applied to the Rule 12 Motion to Dismiss for Lack of Jurisdiction Encompassed Sufficient Allegations of Material Fact and Was Consistent with the Discretionary Authority Which Is Given the Trial Court.

Petitioners attempt to raise a Constitutional issue of lack of due process in the manner by which the Minnesota Supreme Court and the Minnesota District Court reviewed the allegations of the Complaint, together with the supplementary exhibits, amendments and attachments. The decision of the Minnesota Supreme Court in its careful consideration of the facts and in its outline of the numerous contacts or alleged contacts of Harold Burke, individually, and of the Pioneer companies as controlled by the defendant, Harold Burke, amply refutes the petitioners' arguments. Particular reference is made to the decision of the Minnesota Court, 172 N.W.2d at page 308 and following at which section the connection of Burke and the Pioneer companies with the schemes are discussed at length.

Petitioners cite the case of *Taylor v. Portland Paramount Corporation*, 383 F.2d 635 (9th Cir. 1967), as authority for a due process requirement placed upon the trial court. Neither that case nor the other case and reference material cited by the petitioners (Pet. 19 and 20) are authority for the imposition of any more rigid due process standard than was in fact imposed in this case. The three requirements of the *Taylor* case, *supra*, at 641, are met here. Those requirements are:

> "The first requirement is that the nonresident defendant must do some act or consummate some transaction within the forum. Personal presence, however, is not required. Thus, for example, use of the mails may suffice. (Citing the case of McGee v. International Life Ins. Co., 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199.) The second requirement is that the claim must arise out of or result from the defendant's activities within the forum. The third requirement, which assumes the first two are met, is that the assumption of jurisdiction must be consonant with the due process tenants of fair play and substantial justice."

The generally accepted approach, consistent with the above requirements, is that the trial court must be given substantial discretion to resolve jurisdictional questions raised by Rule 12 motions to the trial court. In this regard, see *Moore's Fed. Practice*, Vol. 2a, Sec. 12.07, and the cases cited at footnote 7, page 2259.

2. The Application of the Minnesota Long-Arm Statute Is Consistent with the Due Process Requirements of the United States Supreme Court and Does Not Present an Issue for Constitutional Determination.

By their arguments B, C and D petitioners seek to sustain their claims that the Minnesota Supreme Court ignored due process requirements in applying and construing the Minnesota Long-Arm Statute.

After quoting only a portion of the applicable Minnesota Long-Arm Statute (Pet. 22), petitioners then proceed to the argument that "The Minnesota Supreme Court itself stated that the petitioners are alleged to have conspired outside the state, resulting in injury within the state—thereby eliminating subparagraph (c) from consideration by its very terms (Pet. 22)."

This argument, forming the basis of petitioners' attack, entirely ignores the precise language of the Minnesota Court. At 172 N.W.2d 301, footnote 16, the entire text of *Minn. St.* 543.19—the Minnesota Long-Arm Statute—is set forth, and it ends with the following comment of the Court:

> *"(It has been assumed throughout the proceedings that if this statute is available, it will be applied through subd. 1(c).)"* (Emphasis added.)

Since the decision is in fact premised upon a contact under Subd. 1(c) of the *Minnesota Statute*, the only question unresolved concerns the due process requirements as applied on the facts available. Considering the due process requirements of the *Taylor* case, *supra*, the allegations were found by the Minnesota Court to have involved an act by a nonresident defendant within the forum state and as indicated, the Minnesota Court was proceeding on this basis. Secondly, it would appear that petitioners do not seriously assert that the claim herein involved does not arise out of those activities of the defendant within the forum. The remaining require-

ment then after the first two requirements have been met is that the assumption of jurisdiction must be consonant with the due process demands of fair play and substantial justice.

Two of the cases cited by petitioners serve as comparisons in applying the third due process requirement. The Minnesota Federal District Court case of *Flemmen v. Midland Overseas Shipping Corporation*, 254 F. Supp. 592 (1966), is cited as representing an instance in which the due process requirements were properly applied (Pet. 23). A review of the facts of that case will show that it arose under the language of *Minnesota Statute* 303.13, Subd. 1(3), which provides a means of substituted service on the Minnesota Secretary of State for foreign corporations. By its uncontroverted affidavit, the defendant in that case was shown to be not licensed to do business in Minnesota nor, in fact, doing any business in Minnesota. Further, that the defendant did not maintain any office or place of business in the state and had made no contract pertinent to the litigation with any resident of Minnesota. The defendant, a ship owner, had nothing to do with the stevedoring which did involve plaintiff who was a stevedore involved on a job. Also, that the plaintiff in the case was not a resident of Minnesota but a Wisconsin resident and had no connection with the Minnesota forum. Finally, the defendant showed that there was no contractual performance of any type in Minnesota and that no tort had been committed in whole or in part in Minnesota.

The facts then were substantially distinguishable from those which were before the Minnesota Supreme Court in the instant case. After determining that there was no basis for jurisdiction in the Minnesota Court, Judge Donovan added the following comments:

> "The writer leans toward applying the substituted service statute where the facts and evidence support that conclusion. In the words of Mr. Justice Black, the trend

> is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and nonresidents. (Citing McGee.) [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have such minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Citing also *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, at page 594.)

The other case relied upon by the petitioners is *Beaty v. M. S. Steel Company*, 401 F.2d 157 (4th Cir. 1968). That case is also distinguishable since it involved interpretation of the Maryland Long-Arm Statute, Art. 75, Sec. 96(a)(4), *Maryland Code Annotated Supp.* (1965). That provision is set forth at page 159 of the *Beaty* decision and it is discussed as "more restrictive" than the Uniform Interstate and International Procedure Act provision (p. 159). The Maryland Act is also not as broad as the Illinois Long-Arm Statute and such is acknowledged by the Court. Quite the contrary arises in the case of the Minnesota Statute since it was tailored after the Illinois Act, and the Minnesota Supreme Court, at some length, considers the Illinois Statute and the Illinois cases construing it; see in particular pages 305 and 306 of 172 N.W.2d.

Petitioners' argument does not present an issue of due process nor does it show a failure on the part of the Minnesota Court to apply due process requirements. The case itself, in particular the discussion at 172 N.W.2d 311, indicates that the Minnesota Supreme Court was fully aware of and was proceeding within the Constitutional limits applied to the exercise of jurisdiction.

B. The Supreme Court Should Deny the Petition for Writ of Certiorari Because Other Grounds for Finding Jurisdiction, Consistent with Due Process Requirements, Were Before the Minnesota Supreme Court.

After the Minnesota Supreme Court determined that there was jurisdiction under the Minnesota Long-Arm Statute in the first instance, it was unnecessary for that Court to consider the secondary levels at which jurisdiction could have determined. In Fidelity's situation, it was unnecessary to determine the issue:

> "We hold, therefore, that section 543.19 is retroactive in its application. The effect of this holding is to validate service upon the individual defendants. It also validates service on Delta under Minn. St. 543.19. *It is unnecessary to decide when Fidelity's cause of action arose, itself a vigorously disputed point of law;* treating it for present purposes as arising at the same time as Hunt's, Fidelity's service under section 543.19 is sufficient to subject the defendants to suit in its third-party action." (172 N.W.2d at 307, emphasis added.)

As a consequence, petitioners first recourse should have been to seek a re-hearing by the Minnesota Court. Without having that procedure exhausted, the Supreme Court is called upon to determine, on Constitutional grounds, a statute which could have been sustained by the Minnesota Court at other levels by the arguments made by other litigants on the appeal. Fidelity was one of the other litigants whose arguments were not reached by the Minnesota Court.

III. CONCLUSION

Respondent Fidelity prays that the petition be denied.

Respectfully submitted,

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